

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION - DAYTON**

**Garey E. Lindsay, Regional Director of the
Ninth Region of the National Labor Relations
Board, for and on behalf of the NATIONAL
LABOR RELATIONS BOARD,**

PETITIONER,

v.

MIKE-SELL'S POTATO CHIP COMPANY,

RESPONDENT.

ELECTRONICALLY FILED

CASE NO. 3:17-cv-00126-TMR

**The Honorable Thomas M. Rose
Magistrate Michael J. Newman**

ANSWER TO PETITION FOR 10(j) INJUNCTION

Respondent Mike-sell's Potato Chip Company ("Respondent") hereby files this Answer to the Petition for Preliminary Injunction ("Petition") filed by Gary E. Lindsay, Regional Director ("Regional Director") of the Ninth Region of the National Labor Relations Board ("Board") on April 12, 2017, which seeks interim injunctive relief pending final resolution of a Complaint and Notice of Hearing ("Complaint") issued by the Regional Director in Board Case No. 09-CA-184215 based on an Unfair Labor Practice Charge ("Charge") filed by International Brotherhood of Teamsters, Local Union No. 957 ("Union"). For its Answer, Respondent states as follows, with the paragraph numbers of this Answer corresponding with the paragraph numbers in the Petition:

FIRST DEFENSE

The first two unnumbered paragraphs appearing on page 1 of the Petition contain legal conclusions to which no response is required. To the extent a response is deemed required, Respondent admits the Regional Director filed the Petition, which speaks for itself. However, Respondent denies all remaining allegations in the first two unnumbered paragraphs of the Petition.

1. Respondent admits the allegations in paragraph 1 of the Petition.
2. Paragraph 2 of the Petition contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent admits the Petition purports to invoke Section 10(j) of

the National Labor Relations Act (“Act”). However, Respondent denies all remaining allegations in paragraph 2 of the Petition, including but not limited to any allegation that such invocation is just and proper.

3(a). Paragraph 3(a) of the Petition contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent admits the Union filed the referenced Charge, purporting to invoke Sections 8(a)(1) and 8(a)(5) of the Act. However, Respondent denies all remaining allegations in paragraph 3(a) of the Petition, including but not limited to any allegation that such invocation was just and proper.

3(b). Paragraph 3(b) of the Petition contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent admits the Union amended the referenced Charge, purporting to invoke Sections 8(a)(1) and 8(a)(5) of the Act. However, Respondent denies all remaining allegations in paragraph 3(b) of the Petition, including but not limited to any allegation that such invocation was just and proper.

4. Upon information and belief, Respondent admits the allegations in paragraph 4 of the Petition.

5. Paragraph 5 of the Petition is vague and ambiguous as to what is meant by “full investigation.” Paragraph 5 also contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent admits the Regional Director issued the referenced Complaint, purportedly pursuant to Sections 8(a)(1), 8(a)(5), and 10(b) of the Act. However, Respondent denies all remaining allegations in paragraph 5 of the Petition, including but not limited to any allegation that such invocation was just and proper.

6. Respondent denies the allegations in paragraph 6 of the Petition.

7(a). Paragraph 7(a) of the Petition is vague and ambiguous as to what is meant by “[a]t all material times.” Paragraph 7(a) also contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent admits the allegations in paragraph 7(a) of the Petition.

7(b). Respondent admits the allegations in paragraph 7(b) of the Petition.

7(c). Paragraph 7(c) of the Petition is vague and ambiguous as to what is meant by “[a]t all material times.” Paragraph 7(c) also contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent admits the allegations in paragraph 7(c) of the Petition.

8. Paragraph 8 of the Petition is vague and ambiguous as to what is meant by “[a]t all material times.” Paragraph 8 also contains legal conclusions to which no response is required. To the extent a response is deemed required, and assuming the relevant time period to be November 17, 2008, through December 31, 2016, Respondent admits paragraph 8 of the Petition as follows:

Phil Kazer was Vice President of Sales from August 1, 2012, through December 31, 2016.

Beth Meeker was Human Resources Manager from June 15, 2015, through December 31, 2016.

Dennis Franklin was Zone Manager from November 17, 2008, through June 24, 2016.

Luke Mapp was Director of Brand Marketing from November 17, 2008, through February 7, 2011, and was Vice President of Marketing from February 8, 2011, through December 31, 2016.

9(a). Paragraph 9(a) of the Petition contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent admits the allegations in paragraph 9(a) of the Petition.

9(b). Paragraph 9(b) of the Petition contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent admits the allegations in paragraph 9(b) of the Petition.

9(c). Paragraph 9(c) of the Petition contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent admits the allegations in paragraph 9(c) of the Petition.

10(a). Respondent admits selling Route 102 to an independent distributor on July 25, 2016; however, Respondent denies all remaining allegations in paragraph 10(a) of the Petition.

10(b). Respondent denies the allegations in paragraph 10(b) of the Petition.

10(c). Respondent admits that it did not bargain with the Union over the decision to sell Route 102 to an independent distributor, nor did the Union request such bargaining. Respondent denies all remaining allegations in paragraph 10(c) of the Petition.

10(d). Respondent admits that it did not bargain with the Union over the decision to sell Route 102 to an independent distributor, nor did the Union request such bargaining. Respondent denies all remaining allegations in paragraph 10(d) of the Petition.

11(a). Respondent admits selling Routes 104 and 122 to an independent distributor on September 4, 2016; however, Respondent denies all remaining allegations in paragraph 11(a) of the Petition.

11(b). Respondent admits that, via letter dated August 31, 2016, the Union demanded to bargain over the decision to sell Routes 104 and 122 to an independent distributor.

11(c). Respondent admits that it did not bargain with the Union over the decision to sell Routes 104 and 122 to an independent distributor. Respondent denies all remaining allegations in paragraph 11(c) of the Petition.

11(d). Paragraph 11(d) of the Petition contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent denies the allegations in paragraph 11(d) of the Petition.

11(e). Respondent admits that it did not bargain with the Union over the decision to sell Routes 104 and 122 to an independent distributor. Respondent denies all remaining allegations in paragraph 11(e) of the Petition.

12(a). Respondent admits selling Route 131 to an independent distributor on September 18, 2016; however, Respondent denies all remaining allegations in paragraph 12(a) of the Petition.

12(b). Respondent admits that, on or about September 12, 2016, the Union filed a grievance claiming Respondent had violated the expired collective bargaining agreement by selling Route 131 to an independent distributor. However, Respondent denies all remaining allegations in paragraph 12(b) of the Petition.

12(c). Respondent admits that it did not bargain with the Union over the decision to sell Route 131 to an independent distributor, nor did the Union request such bargaining. Respondent denies all remaining allegations in paragraph 12(c) of the Petition.

12(d). Paragraph 12(d) of the Petition contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent denies the allegations in paragraph 12(d) of the Petition.

12(e). Respondent admits that it did not bargain with the Union over the decision to sell Route 131 to an independent distributor, nor did the Union request such bargaining. Respondent denies all remaining allegations in paragraph 12(e) of the Petition.

13(a). Respondent admits that, via letter dated August 31, 2016, the Union demanded production of the information described in paragraph 13(a) of the Petition. However, Respondent denies all remaining allegations in paragraph 13(a) of the Petition.

13(b). Paragraph 13(b) of the Petition contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent denies the allegations in paragraph 13(b) of the Petition.

13(c). Respondent admits that, via letter dated September 12, 2016, Human Resources Manager Beth Meeker declined to produce information demanded by the Union for the express purpose of decisional bargaining over the sale of Routes 104 and 122. However, Respondent denies all remaining allegations in paragraph 13(c) of the Petition.

14. Paragraph 14 of the Petition contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent denies the allegations in paragraph 14 of the Petition.

15. Paragraph 15 of the Petition contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent denies the allegations in paragraph 15 of the Petition.

16. Paragraph 16 of the Petition contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent denies the allegations in paragraph 16 of the Petition.

17. Paragraph 17 of the Petition contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent denies the allegations in paragraph 17 of the Petition.

18. Paragraph 18 of the Petition is vague and ambiguous as to what is meant by “previous application” and by “relief requested herein.” Upon information and belief, Respondent admits the Board has filed no previous petition seeking relief under Section 10(j) of the Act. However, Respondent denies all remaining allegations in paragraph 18 of the Petition.

19. Paragraph 19 of the Petition contains legal conclusions to which no response is required. To the extent a response is deemed required, Respondent denies the allegations in paragraph 19 of the Petition.

Respondent denies that the Regional Director is entitled to the relief set forth in the Petition’s Prayer for Relief on pages 8, 9, 10, and 11 of the Petition, and further denies that the Regional Director is entitled to any relief whatsoever.

SECOND DEFENSE

Respondent denies any allegations in the Petition not expressly admitted in this Answer.

THIRD DEFENSE

The Petition fails to state a claim for which relief may be granted.

FOURTH DEFENSE

Pleaded solely in the alternative, and without conceding this represents an affirmative defense for which Respondent bears the burden of proof, Respondent took all actions for legitimate business reasons and in accordance with controlling legal principles established by the Board and/or the U.S. Supreme Court.

FIFTH DEFENSE

The Regional Director cannot establish reasonable cause to believe that the allegations set forth in the Petition are true, or that Respondent has engaged in or will engage in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

SIXTH DEFENSE

The Petition, including its overbroad Prayer for Relief, is not just and proper.

SEVENTH DEFENSE

Pleaded solely in the alternative, and without conceding this represents an affirmative defense for which Respondent bears the burden of proof, Respondent's elimination or sale of a route is not a mandatory subject of bargaining.

EIGHTH DEFENSE

The relief requested in the Petition would not result in reinstatement of the *status quo ante* and, if granted, would impose an undue hardship on Respondent, its bargaining unit employees, and its independent distributors.

NINTH DEFENSE

The Petition is barred, in whole or in part, by waiver, estoppel, laches, unclean hands, statutes of limitation, accord and satisfaction, and/or contractual release.

TENTH DEFENSE

The Union did not timely challenge or request to bargain over Respondent's decision to sell certain of its Routes to independent distributors.

ELEVENTH DEFENSE

To the extent Respondent declined the Union's request to bargain over the decision to sell certain Routes to independent distributors, Respondent's action was lawful and appropriate because the decision to sell such Routes was not a mandatory subject of bargaining.

TWELFTH DEFENSE

To the extent Respondent declined to produce certain documents requested by the Union for the express purpose of decisional bargaining over a nonmandatory subject, Respondent's action was lawful and appropriate because the Union is not statutorily entitled to information regarding nonmandatory subjects of bargaining over which Respondent declines to bargain.

THIRTEENTH DEFENSE

Respondent bargained in good faith with the Union to an overall impasse before unilaterally implementing its revised last, best, and final offer in June 2013, the terms of which permit Respondent to sell Routes without bargaining over those decisions.

FOURTEENTH DEFENSE

This Petition is premature and unripe for adjudication, to the extent Respondent's statutory duty to engage in decisional bargaining depends—in whole or in part—on which terms and conditions of employment were in effect when the Routes were sold to independent distributors, an unanswered question pending in an ongoing compliance proceeding in Case No. 09-CA-094143.

FIFTEENTH DEFENSE

Respondent's actions were consistent with the Judgment of the U.S. Court of Appeals for the District of Columbia Circuit in Case Nos. 14-1021 and 14-1031, enforcing the Board's Order in Case No. 09-CA-094143 that Respondent "put into effect all terms and conditions of employment provided by the . . . drivers unit contract that expired on November 17, 2012."

WHEREFORE, having fully answered, Respondent demands the following relief:

- (a) That the Petition be dismissed, with prejudice; and
- (b) All other relief to which Respondent may be entitled.

This 25th day of April, 2017.

Respectfully submitted,

/s/ Jennifer R. Asbrock

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CERTIFICATE OF SERVICE

I hereby certify that this Answer to Petition for 10(j) Injunction was electronically filed with the U.S. District Court for the Southern District of Ohio by using the CM/ECF system, which will send a notice of electronic filing to the following, with hard copies served as follows on this 25th day of April, 2017:

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